UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	MDL Docket No. 1446
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	Civil Action No. H-01-3624 and Consolidated, Related Coordinated Cases
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

DEUTSCHE BANK ENTITIES' MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFF'S MOTION FOR RECONSIDERATION OF MARCH 29 ORDER DISMISSING CLAIMS AGAINST DEUTSCHE BANK ENTITIES

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Deutsche Bank AG ("DB"), Deutsche Bank Trust Company Americas (formerly known as Bankers Trust Company) ("DBTC"), and Deutsche Bank Securities Inc. (formerly known as Deutsche Banc Alex. Brown Inc.) ("DBSI") (collectively, the "DB Entities") respectfully submit this opposition to plaintiffs' Motion for Reconsideration of Order Dismissing Claims Against the Deutsche Bank Defendants ("Motion" or "Mot."). The DB Entities incorporate by reference the arguments made in their prior briefing in the Newby and WSIB actions.[1]

Plaintiffs' Motion should be denied for several reasons. The Motion raises no arguments that were unavailable to plaintiffs previously, and is, for that reason alone, beyond the scope of Rule 54(b), and should be denied. In any event, attempting to create confusion where none exists, plaintiffs' Motion, appearing to suggest that this Court was unaware of its prior rulings, misconstrues those rulings and seeks to avoid the effect of the recent Fifth Circuit decision in Southland Securities Corp. v. INSpire Insurance Solutions Inc., __ F.3d __, 2004 WL 626721 (5th Cir. Mar. 31, 2004), which rejects collective pleading to support fraud claims against multiple defendants. Finally, plaintiffs' Motion does provide grounds for clarifying the various debt offerings as to which plaintiffs ***are barred*** from asserting claims (including those offerings with respect to which plaintiffs never, in any of their voluminous complaints, sought relief against any DB Entity). For all these reasons, plaintiffs' Motion should be denied and the claims against the DB Entities dismissed with prejudice.

[1] See (i) DB's briefing in support of its motion to dismiss the Consolidated Complaint ("Complaint or Compl.") in the Newby action ("DB Mem." and "DB Reply"); (ii) the DB Entities' briefing in support of their motion to dismiss the First Amended Consolidated Complaint ("Amended Complaint" or "Am. Compl.") in the Newby action ("DBE Mem.," "DBE Reply" and "DBE Supp."); and (iii) the DB Entities' briefing in support of their motion to dismiss the First Amended Complaint ("WSIB Compl.") in the WSIB action ("DBE WSIB Mem.," "DBE WSIB Reply," "DBE WSIB Supp." and "DBE WSIB Resp. Sur-reply").

I. Plaintiffs' Motion Is Improper Under Rule 54(b)

Despite this Court's unequivocal holding that plaintiffs' Sections 10(b)/Rule 10b-5 and 20(a) claims against the DB Entities must be dismissed because of "***insurmountable challenges*** under the applicable period of repose and statute of limitations,"[2] plaintiffs seek reconsideration under Federal Rule 54(b).[3] Mot. at 1. Plaintiffs' Motion, however, is entirely improper as plaintiffs only raise the same arguments already considered and rejected by this Court.[4]

A Rule 54(b) motion serves a narrow purpose and is "only appropriate to allow a party to correct manifest errors of law or fact or present newly discovered evidence,"[5] or where there has been an intervening change in the controlling law.[6] A motion for reconsideration is not the proper vehicle for advancing legal theories, arguments or facts that could have been presented earlier.[7] Here, plaintiffs have not identified any error of law, nor can they. Furthermore, plaintiffs have raised nothing that has not or could not have been raised before, and the Motion should be denied. To the extent, however, that this Court has the inherent power to reconsider

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[2] In re Enron Corp. Sec., Derivative & ERISA Litig., __ F. Supp. 2d __, 2004 WL 633277, at *15, 28 (S.D. Tex. Mar. 29, 2004) (hereinafter the "March 29 Order") (emphasis added).

[3] In the context of multi-party litigation, motions to dismiss granted in favor of a single party are considered interlocutory in nature, and are thus subject to Rule 54(b). See Fed. R. Civ. P. 54(b); United States v. Regents of the Univ. of Cal., 363 F.3d 398, 401 n.2 (5th Cir. 2004) (citations omitted).

[4] Cf. Mot. at 3–5 & n.2; with Mem. of Law in Opp. to the Deutsche Bank Defendants' Mot. to Dismiss ("Pl. Mem.") at 2, 8, 10, 22–25, and March 29 Order, at *7–28. "Motions for reconsideration are disfavored . . . and are not the place for parties to make new arguments not raised in their original briefs. . . . Nor is reconsideration to be used to ask the Court to rethink what it has already thought." Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc., 215 F.R.D. 581, 582 (D. Ariz. 2003) (citations omitted).

[5] Century Prods. Co. v. Cosco, Inc., No. Civ. A. 3:00-CV-0800, 2003 WL 251957, at *5 (N.D. Tex. Jan. 1, 2003) (applying Rule 54(b)) (citation omitted); see also Schiller v. Physicians Res. Group Inc., 342 F.3d 563, 567 (5th Cir. 2003) ("A motion to alter or amend . . . under Rule 59(e) must clearly establish either a manifest error of law or fact or must present newly discovered evidence and ***cannot be used to raise arguments which could, and should, have been made before the judgment issued.***") (citations omitted; internal quotations omitted; emphasis added).

[6] Schiller, 342 F.3d at 567–68 (citing In re Benjamin Moore & Co., 318 F.3d 626, 629 (5th Cir. 2002)). In deciding a Rule 54(b) motion for reconsideration, courts borrow the standards applied under Rules 59 and 60. See, e.g., Century, 2003 WL 251957 at *5 (citing cases discussing standard under Rules 59 and 60).

[7] See supra n.4; see also Louisiana v. Sprint Communications Co., 899 F. Supp. 282, 284 (M.D. La. 1995) ("[L]itigants are expected to present their strongest case when the matter is first considered. . . . [a] motion to reconsider based on recycled arguments only serves to waste the resources of the court."); Resolution Trust Corp. v. Holmes, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994) (same).

interlocutory orders sua sponte, see Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co., 208 F. Supp. 2d 687, 688 (S.D. Tex. 2001), the DB Entities address certain issues which may benefit from clarification.

II. Plaintiffs Cannot Escape Their Burden To Plead Timely Fraudulent Acts

This Court properly dismissed plaintiffs' Section 10(b) claims against each DB Entity because they failed to allege (with the particularity mandated by Rule 9(b) and the PSLRA) that any, much less each, DB Entity engaged in a timely fraudulent act. In the March 29 Order, this Court concluded both that the continuing wrong doctrine cannot be used in this case to seek damages for fraudulent ***acts*** which are otherwise time-barred by the statute of repose, (id. at *18), and that absent these time-barred acts, plaintiffs failed to sufficiently plead that any DB Entity engaged in a timely fraudulent act (id. at *15, 28). The Court's March 29 Order is correct on the law.

In urging this Court to reconsider its decision, plaintiffs argue that alleged scienter relating to discrete untimely acts can serve as scienter for unrelated allegedly timely material misstatements and omissions. Mot. at 2–5. This argument, however, misconstrues statements made in dicta in In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549 (S.D. Tex. 2002) (hereinafter the "December Order") as inconsistent with this Court's ***holding*** in the March 29 Order. Mot. at 2. Plaintiffs are simply wrong.

Although this Court observed that allegations that are otherwise time-barred may be "admissible ***solely*** for [the] purpose of establishing [a] ***scheme and/or scienter***,"[8] this observation is easily reconciled with this Court's dismissal of plaintiffs' 1934 Act claims against the DB Entities: For purposes of fraudulent representation statutes, a scheme consists of forming

[8] December Order, 235 F. Supp. 2d at 689 (emphasis added).

a plan or devising some trick to perpetrate fraud upon another. See Black's Law Dictionary 1344 (6th ed. 1990) (citation omitted). A scheme connotes a plan or pattern of conduct which is intended to or is reasonably calculated to deceive. Id. The term "scheme" is thus similar to scienter in that both reference the defendant's ***intent***, rather than the defendant's ***actions***. What plaintiffs have failed to plead are timely actions for which relief may be sought.

While this Court, in dicta, noted that plaintiffs' allegations about certain tax transactions ***if timely***, could have established scienter ***as to a pattern of discrete tax schemes***, this Court ***never*** suggested (and has in fact twice rejected) that any DB Entity had scienter as to any overarching Enron-related Ponzi scheme. March 29 Order, at *16–18. Unlike other bank defendants, there has never been any particularized pleading that any DB Entity was privy to information concerning the true financial condition of Enron. As such, plaintiffs mischaracterize the March 29 Order when they claim that "th[is] Court recognized . . . Enron's Bankruptcy Examiner found 'that by 2000, ***while continuing to recommend Enron securities***, Deutsche Bank had learned a substantial amount about Enron's undisclosed and precarious off-balance sheet debt.'" Mot. at 5 (quoting in part March 29 Order, at *14 n.33) (emphasis added in Motion). In fact, this Court merely noted that this argument was made ***by plaintiffs***. March 29 Order, at *14 n.33 ("Lead Plaintiff has quoted the Bankruptcy Examiner's Third Report . . . to argue that by 2000, while continuing to recommend Enron securities, Deutsche Bank had learned a substantial amount about Enron's undisclosed and precarious off-balance sheet debt . . . .").

Indeed, plaintiffs' attempt to use the Examiner's Third Report for support (Mot. at 5) is not only an old argument and a mischaracterization of the March 29 Order, it also affirmatively undermines their position. Contrary to plaintiffs' argument that Enron was sharing details of its financial circumstances with "BT/Deutsche," the Examiner actually found that, when

"BT/Deutsche" inquired about Enron's off-balance sheet debt, Enron ***misled*** "BT/Deutsche." 3d Report, App. G at 26 ("[i]n light of Enron's prior assurances that its off-balance sheet obligations were in the range of $9–10 billion, BT/Deutsche was ***surprised to learn that additional obligations of $25.116 billion were not shown on Enron's balance sheet.***") (emphasis added). Cf. Mot. at 5 with March 29 Order, at *7–11, 14–15.[9]

As even plaintiffs admit, they bear the burden of showing that each DB Entity "knowingly commit[ted] additional ***distinct, deceptive acts*** during the period of repose for which plaintiffs may bring claims." Mot. at 2 (emphasis added). This Court has ruled — twice — that plaintiffs failed to do precisely that — they failed to plead that any DB Entity engaged in any ***timely*** deceptive ***acts*** during the Class Period, with scienter ***as to*** those acts. March 29 Order, at *18. Nothing in plaintiffs' Motion creates a ground for altering this clear and unequivocal ruling.

Further disregarding this Court's consideration of the "totality of the circumstances,"[10] plaintiffs again claim that, even if they failed to plead that any DB Entity engaged in a timely fraudulent scheme, the DB Entities made timely material misstatements and omissions. Mot. at 1. This argument, however, conveniently ignores what this Court recognized — and the Fifth Circuit confirmed two days after the March 29 Order — "[t]o satisfy Rule 9(b)'s pleading requirements, . . . plaintiffs must 'specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were

[9] As such, plaintiffs also cannot use any allegations of scienter as to any alleged ***discrete*** tax scheme to establish that any DB Entity made a material misstatement or omission about Enron's financial condition. Notwithstanding the length of the Amended Complaint, plaintiffs nowhere plead that any DB Entity made any material misstatement or omission with the required particularity. See also Southland, at * 3 ("'A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail.'") (citation omitted). Since the Amended Complaint fails to allege any particularized facts regarding any material misstatements or omissions, plaintiffs' claims were properly dismissed.

[10] Contrary to plaintiffs' suggestion otherwise (Mot. at 3), this Court's prior decisions have correctly applied Goldstein v. MCI WorldCom, 340 F.3d 238, 247 (5th Cir. 2003).

fraudulent.'" Southland, 2004 WL 626721, at *3; accord In re Blockbuster Inc. Sec. Litig., No. 3:03-CV-0398-M, 2004 WL 884308, at *12 (N.D. Tex. Apr. 26, 2004) (same; citation omitted); December Order, 235 F. Supp. 2d at 564 n.2. In Southland, the Fifth Circuit explained that

> [f]or purposes of determining whether a statement made by the corporation was made by it with the requisite Rule 10(b) scienter we believe it appropriate to look to the ***state of mind of the individual corporate official*** or officials ***who make or issue the statement*** (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) ***rather than generally to the collective knowledge of all the corporation's officers and employees*** acquired in the course of their employment.

2004 WL 62671, at *7 (citing cases; emphasis added). As this Court has already found, the Amended Complaint fails to allege that any individual at any DB Entity acted with scienter ***and*** fails to allege with the requisite particularity that any DB Entity made any material misstatements or omissions. March 29 Order, at *15.

Instead, the Amended Complaint improperly attempts to plead under the umbrella of "Deutsche Bank" without listing a single individual or DB Entity that made any alleged material misstatement or why. Am. Compl. ¶ 107(a); DBE Mem. at 12 n.15. As the Fifth Circuit recently concluded, however, such pleading is wholly insufficient: allegations contained in a complaint against "'***defendants' as a group***" ***cannot*** be construed as "properly imputable to any particular individual defendant." Southland, 2004 WL 626721, at *6 (emphasis added). Despite the general "collective knowledge" doctrine, there can be ***no imputation of collective knowledge as proof of scienter***. Id. at *7 (emphasis added) ("the required state of mind must actually exist in the individual making . . . the misrepresentation, and may not simply be imputed to that individual on general principles of agency."). Plaintiffs' one-entity approach to pleading relies on the collective knowledge doctrine explicitly rejected by the Fifth Circuit and is thus inadequate.

Consistent with the Fifth Circuit's ruling in Southland, this Court previously recognized that plaintiffs' adequate scheme allegations as to ***other*** defendants made it unnecessary for the Court to consider the adequacy of plaintiffs' other conclusory allegations:

> The very nature of Defendants' personal and intimate knowledge of the fraud from the alleged direct participation in the Ponzi scheme necessarily makes their highly positive public statements and buy-stock recommendations misrepresentations of the truth. Thus the legal basis of the claims makes irrelevant a ***specific analysis of each statement, which would be required if they were asserting only claims of a material misrepresentation or omission under Rule 10b-5(b).***

December Order, 235 F. Supp. 2d at 688–89 (emphasis added). Since this Court concluded that plaintiffs failed to allege that any DB Entity engaged in any timely scheme under Rule 10b-5(a) or (c), their conclusory allegations concerning material misstatements and omissions were, and remain, wholly inadequate and cannot support their claims.

III. Plaintiffs Have Never Pled Subject Matter Jurisdiction Over The "Foreign Debt Purchases" Governed By Regulation S

This Court's March 29 Order sustained claims against the DB Entities under Section 12 of the 1933 Act with respect to four private placements of Enron-related notes that plaintiffs have designated the "Foreign Debt Securities." Am. Compl. at 409.[11] Plaintiffs' Motion ignores the fact that plaintiffs have completely failed to plead that the Foreign Debt Securities, sold under Regulation S, are within this Court's subject matter jurisdiction, such that these 1933 Act claims against the DB Entities should be dismissed with prejudice.

This Court does not have subject matter jurisdiction over any sales made by any DB Entity under Regulation S.[12] Plaintiffs "constantly bear[] the burden of proof that jurisdiction

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[11] As discussed below, 1933 Act claims relating to certain other securities mentioned in the complaint have never been pled and, if pled, would now be time-barred.

[12] The issue of subject matter jurisdiction may be raised at any phase of the proceeding or by the court sua sponte. Bridgmon v. Array Sys. Corp., 325 F.3d 572, 575 (5th Cir. 2003) (citations omitted); Warren v. United States, 874 F.2d 280, 281–82 (5th Cir. 1989) (citation omitted).

does in fact exist." Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001) (citing Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980)); McNamara v. Bre-X Minerals Ltd., 32 F. Supp. 2d 920, 922 (E.D. Tex. 1999) (same) (citing Boudreau v. United States, 53 F.3d 81, 82 (5th Cir. 1995)).

The Securities Act of 1933 is silent as to extraterritorial reach.[13] As the Supreme Court has recognized, absent contrary intent in the statute, there is a presumption against extraterritorial jurisdiction. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), superseded by statute on other grounds as stated in Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535, 1543 n.9 (9th Cir. 1994). This is especially true in the case of Regulation S, which excepts from the protections afforded by registration, sales of securities made outside of the United States to non-U.S. persons. Before applying the securities laws beyond our shores, courts have therefore required pleading that establishes the requisite U.S. nexus, whether by conduct or effect, to support the subject matter jurisdiction of the federal courts. See Robinson, 117 F.3d at 904–06.

Sales of the Foreign Debt Securities under Regulation S were conducted entirely outside the United States to non-U.S. investors. Plaintiffs have never pled otherwise. Thus, the Amended Complaint is facially inadequate to establish subject matter jurisdiction over the "Foreign Debt Securities." See generally, Am. Compl. ¶¶ 107 (b), 641.1–641.44, 1016.1–1016.9. In fact, plaintiffs' claim that they purchased their securities on the Luxembourg Stock Exchange supports the opposite conclusion. Id. Accordingly, plaintiffs' Section 12(a)(2) claims against DBSI and Section 15 claims against DB relating to the Foreign Debt Securities must be dismissed for lack of subject matter jurisdiction.

[13] See Robinson v. TCI/US West Communications Inc., 117 F.3d 900, 904–06 (5th Cir. 1997).

IV. Plaintiffs Have Failed To And May Not Now Make Claims As To Certain Other Securities Offerings

The Amended Complaint is a confusing jumble of allegations relating to many securities offerings, including offerings as to which plaintiffs actually have never asserted claims against any DB Entity. Given this Court's March 29 Order, the DB Entities seek to clarify that any claims as to certain securities offerings and note resales are time-barred based on the March 29 Order and Section 13 of the 1933 Act.

A. This Court Has Already Decided That Plaintiffs' Claims Arising From The Osprey I Note Resales Are Time-Barred

This Court has already held that plaintiffs' claims on the Osprey I note resales in September 1999 are time-barred by the three-year statute of repose.[14] Order re Credit Suisse Defendants' Motion to Dismiss, In re Enron Corp. Sec., Derivative & ERISA Litig., MDL-1446, H-01-3624, slip op. at 7 (S.D. Tex. Mar. 31, 2004) (# 2044). As with the Credit Suisse Defendants, plaintiffs first alleged Section 12(a)(2) and 15 claims against DBSI and DB respectively, over three years after the resale of Osprey I notes. Cf. Compl. ¶¶ 1005–1016; with Am. Compl. ¶¶ 1016.1–1016.9. Therefore plaintiffs' Section 12(a)(2) and 15 claims arising from the Osprey I note resales should be dismissed as time-barred.

B. Other 1933 Act Claims, Including On The Enron Zero Coupon Notes, Are Time-Barred

In the March 29 Order, this Court identified four offerings or private placements which had been referenced in plaintiffs Amended Complaint which were ***not*** Foreign Debt Securities,[15] and appeared to suggest that plaintiffs' Section 12(a)(2) and 15 (control liability) claims against

[14] Indeed, plaintiffs have agreed as to Lehman Brothers that claims filed against bank entities first named/added in the Amended Complaint which arise from securities sales prior to January 14, 2000 are time-barred.

[15] (1) January 1997, 6 million shares of 8-1/2% Enron capital preferred shares at $25 per share; (2) in February 1999, 27.6 million shares of Enron common stock at $31.34 per share; (3) in February 2001, $1.9 billion Enron Zero Coupon convertible bonds; and (4) on June 9, 1999 38.5 million shares of Azurix IPO at $19 per share. March 29 Order, at *12.

the DB Entities might also apply to those offerings or private placements. Plaintiffs, however, ***have never*** alleged that the Deutsche Bank Entities violated Sections 12(a)(2) and 15 based upon their participation in any of these non-Foreign Debt Securities offerings.

Moreover, plaintiffs only first alleged Section 12 and 15 claims, against DBSI and DB respectively, in the Amended Complaint (deemed to relate back to January 14, 2003 (see March 29 Order, at *24)). Am. Compl. ¶¶ 1016.1–1016.9. As such, even if plaintiffs now tried to assert these claims, they would be time-barred by the statute of repose as to any offerings prior to January 14, 2000. Finally, plaintiffs also can assert no claim as to the July 2001 $1.9 billion offering of Enron Zero Coupon convertible bonds. The Amended Complaint makes ***no 1933 Act claim*** against the DB Entities based upon this offering. See Am. Compl. ¶¶ 1016.1–1016.9. Any attempt to now make a claim would be time-barred under the one-year notice period. Accordingly, plaintiffs can assert no 1933 Act claims arising from these offerings as to any of the DB Entities.

CONCLUSION

For the reasons stated above and in the DB Entities' briefing in support of their motions to dismiss the complaints in the Newby and WSIB actions, the DB Entities respectfully request that this Court (i) uphold its dismissal of plaintiffs' 1934 Act claims in the Newby action and dismiss these claims with prejudice, and (ii) also dismiss with prejudice all remaining 1933 Act claims against DBSI and DB.

Dated: May 19, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 19, 2004, I caused a true and correct copy of the foregoing document to be served on all counsel by e-mail and fax in accordance with the Order Regarding Service of Papers and Notice of Hearings, entered by the Court on April 10, 2002.

_____

Thomas C. Graham